

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

KEVIN R. SHAY,)	
)	
Petitioner,)	Civil Action No. 19-213
)	District Judge David S. Cercone/
v.)	Magistrate Judge Maureen P. Kelly
)	
WARDEN GILMORE; THE DISTRICT ATTORNEY OF THE COUNTY OF ALLEGHENY; and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,)	
)	Re: ECF No. 49
)	
Respondents.)	
)	

MEMORANDUM ORDER

Kevin R. Shay (“Petitioner”) filed a Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2254 (the “Petition”) in this Court, seeking solely to attack the fact that the state court in its sentencing order had not properly credited Petitioner with all the time that he was owed.

The case was referred to Magistrate Judge Maureen Kelly in accordance with the Magistrate Judges Act, 28 U.S.C. § 636(b)(1), and Local Civil Rules 72.C and D.

Magistrate Judge Kelly’s Report and Recommendation, ECF No. 43, filed on December 26, 2019, recommended that the Petition be dismissed as moot because, during the pendency of this Petition, the credit against his sentence, which Petitioner had sought in the Petition, was granted to him by the state court at the request of Respondents.

During the pendency of these proceedings, Petitioner attempted to add many new claims that arose only after the initiation of the Petition. The Court denied these attempts to amend or supplement the original Petition. See, e.g., ECF No. 38. It would not be an overstatement to say

that Petitioner has papered the Court with multiple motions. District Judge Cercone also denied what he deemed to be a Motion for Reconsideration even after the Court dismissed the case as moot. ECF No. 48.

Apparently not satisfied, Petitioner now has filed a “Motion to File a Second Successive Writ Pursuant to USC § 2254” (“Motion to File”). ECF No. 49.

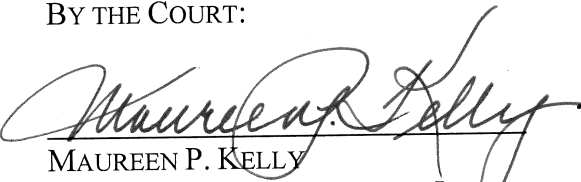
The Motion to File is denied without prejudice to Petitioner filing the Motion to File in the United States Court of Appeals for the Third Circuit, to the extent that the Motion can be properly considered as having been filed pursuant to 28 U.S.C. § 2244(b)(3)(A), which provides that “[b]efore a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.”

To the extent that the Motion to File can be construed as anything else, it is denied with prejudice as this case is closed. Moreover, the Motion to File cannot be construed as a post judgment motion validly filed pursuant to Fed. R. Civ. P. 60(b), because it does not attack the this Court’s prior order dismissing the Petition as moot but instead seeks to raise a new substantive ground for relief that did not exist at the time of the filing of the instant Petition, namely, the state trial court’s alleged refusal to sign an amended order, again giving Petitioner credit for time served that the state court previously gave Petitioner. See e.g., Patterson v. Lamas, CV 13-414, 2018 WL 10096592, at *2 (W.D. Pa. Jan. 9, 2018) (“We must first decide whether Dowell’s motion is properly characterized as a Rule 60(b) motion or whether it is actually a second or successive habeas petition under 28 U.S.C. § 2255(h).”), *reconsideration denied*, 2018 WL 10096589 (W.D. Pa. Feb. 12, 2018) (quoting United States v. Dowell, 438 F. App’x 706, 708 (10th Cir. 2011)).

Accordingly, **IT IS HEREBY ORDERED** this 16th day of April 2020, the Motion to File, ECF No. 49, is DENIED.

In accordance with the Magistrate Judges Act, 28 U.S.C. § 636(b)(1), and Rule 72.C.2 of the Local Rules of Court, the parties are allowed fourteen (14) days from the date of this Order to file an appeal to the District Judge which includes the basis for objection to this Order. Any appeal is to be submitted to the Clerk of Court, United States District Court, 700 Grant Street, Room 3110, Pittsburgh, PA 15219. Failure to file a timely appeal will constitute a waiver of any appellate rights.

BY THE COURT:



MAUREEN P. KELLY
UNITED STATES MAGISTRATE JUDGE

cc: The Honorable David S. Cercone
United States District Judge

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All Counsel of record via EM-ECF